

NO. 82-1764

Office - Supreme Court, U.S.

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ALEXANDER L. STEVENS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

GULF & SOUTHERN TERMINAL CORPORATION,
Petitioner

v.

SS PRESIDENT ROXAS, HER ENGINES,
TACKLE, ETC.,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fourth Circuit

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QUESTION PRESENTED

Should not the action of the Mexican Court acting in a bankruptcy proceeding which authorized the Trustee ("Sindico") to sell the bankrupt's vessel free of liens and encumbrances be afforded recognition and enforced in our Courts, such action of the Mexican Courts being done in accordance with Mexican law and reaching the same practical result as and being similar to an in rem proceeding in our jurisdiction?

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IN THE
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-versus-

S.S. PRESIDENT ROXAS, HER ENGINES,
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Respondent

BRIEF FOR RESPONDENT IN
OPPOSITION TO THE PETITION FOR
WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Respondent's position is that the sale of the S.S. PRESIDENT ROXAS by the Mexican Bankruptcy Court free of liens and encumbrances effectively extinguished all prior existing liens, including petitions as would an in rem proceeding here. The proceeding was in the nature of an in rem sale in admiralty with the same practical effect.

STATEMENT

It is respectfully submitted that the STATEMENT supplied by Petitioner, Pages 2 and 3 of its Petition, does not supply the necessary detail.

This action was commenced on the 18th day of September, 1980, with the filing of a Complaint by Gulf & Southern Terminal Corporation, as Plaintiff, against the S.S. PRESIDENT ROXAS, her Engines, Tackle, Apparel, etc., in rem. The vessel was arrested on the 20th day of September, 1980, on its arrival at the port of Morehead City, North Carolina.

The PRESIDENT ROXAS is a steel, deep-sea cargo vessel, formerly named the S.S. RIO YAQUI, and at the times complained of by the Petitioner was operated by Navimex S.A. de C.V., a

Mexican corporation.

On January 14 through 18, 1980, at the port of Houston, and on January 20 through 23, 1980, at the port of Freeport, Texas, the Plaintiff performed stevedoring services and furnished materials to said vessel. The charges for those services constituted a maritime lien at the time against the vessel, then the S.S. RIO YAQUI.

Sometime in late June or early July of 1980, Philippine President Lines, now owner, became aware that the S.S. RIO YAQUI had been seized by the Bankruptcy Court in Mexico as an asset of the bankrupt Navimex and was to be sold. As a result of this information, representatives of Philippine President Lines contacted the Court appointed Receiver (Sindico) in the bankruptcy proceeding of Navimex. An official of Philippine

President Lines met with Sindico on several occasions and obtained permission to inspect the vessel. The Philippine President Line official went to Tampico where the vessel was under arrest or detention, as an asset, and inspected the vessel.

The vessel at that time was within the jurisdiction and custody of the Bankruptcy Court. Philippine President Lines advised the Sindico that it was interested in purchasing the vessel provided it be sold to Philippine President Lines free of liens and encumbrances.

An initial offer was made, and subsequently increased. The offer was received by the Sindico on July 23, 1980, containing the purchase price which included any duties, fees, levies, taxes, notarial fees, or charges of

whatever nature imposed or required by the Mexican Government or any of its agencies. According to the terms of the offer, the vessel was to be delivered free of any cargo, free from any liens or encumbrances of whatever nature, and free from any attachments by any creditor and free from average. The further term of the offer was that the Mexican Court or Government would render unto the buyer free and clear title to the vessel. The Mexican Court was further to provide, on delivery of the vessel, any necessary documents required to register the vessel under the Philippine Flag.

On June 18, 1980, the Chairman of the Board of the Directors of Navimex had applied to the Eleventh Judge for Civil Matters of the Federal District Court of Mexico for the Declaration

of the bankruptcy of Navimex in view of its impossibility to continue its operation, due to financial insolvency, and the matter was assigned a docket number in the First Clerk's Office for the same Court. On June 26, 1980, the bankruptcy of Navimex was declared by the Eleventh Judge for Civil Matters of the Federal District Court of Mexico.

On July 27, 1980, the Sindico brought an incidental proceeding for permission to sell the vessel owned by the bankrupt which was in possession of the Bankruptcy Judge at the time, because maintenance during the prolonged stay of the ship in anchorage would produce, in addition to the expenses resulting therefrom, a decline in the value of it and expose the vessel to losses by pilferage. That was done.

Statutory appraisals were effected

by the office of the Sindico and by the bankrupt and submitted to the Eleventh Judge for Civil Matters.

On July 24, 1980, the office of the Sindico submitted to the Eleventh Judge for Civil Matters the offer made by Philippine President Lines. The Contract of Sale was executed between the Sindico and Philippine President Lines pursuant to Court authorization of the sale, free of liens and encumbrances on August 15, 1980.

The Court was properly informed of the Offer to Purchase by Philippine President Lines by the Sindico and notified that pursuant to the Offer, the ship was to be delivered at the port of Tampico free and clear of any liens whatsoever.

The act of sale was protocolized by the head of the Notarial Office Number

Six for the Federal District.

As required by Philippine Law, a Bill of Sale was executed in English by the Sindico, transferring the vessel to the Philippine President Lines.

The vessel was discharged and released in the port of Tampico.

A commercial invoice, delivery receipt, protocol of delivery and acceptance, and a certificate of authentication were executed for the sale.

The Mexican provisions for notice of the bankruptcy were followed, which included advertising in the local papers of the port where the vessel was held by the Bankruptcy Court, Tampico, and also in the Mexican Legal Gazette, as required.

REASONS FOR DENYING
THE WRIT

First, the decision below of the Fourth Circuit, Gulf & Southern Terminal Corporation vs. S.S. PRESIDENT ROXAS, her Engines, etc., in rem, Number 82-1447, and set forth as Appendix A p. 1a of the Petition, fully recognized that the Court was following hundreds of years of sound maritime precedent, quoting The Trenton, 4 F. 657 (E.D. Mich. 1888). (Pet. App A p. 4a) For that reason alone, this case therefore meets none of the considerations set forth in Rule 17.1(a)(b)(c) of this Court, Respondent's Appendix A, p. 1a. There is no conflicting federal decision, no conflicting decision of any state court of last resort, nor is there a departure from the accepted and usual course of judicial proceedings or sanction of

such. This matter does not involve any decision of the state court of last resort. Since the lower Courts found maritime precedent, this is not a question that should be settled by this Court nor is it in conflict with any applicable decisions of this Court.

Both Courts below, see Appendices A and B, Pages 1a and 6a of the Petition, held that the "Mexican court's judicial sale of the vessel employed procedures virtually identical to those which are denominated as an in rem proceeding under American law" (Page 3a of Petition). A reading of Supplemental Rule for Certain Admiralty and Maritime Claims, E(9)(b), Respondent's Appendix B, p. 3a, will show that the procedure followed by the Mexican Bankruptcy Court in disposing of the assets of the bankrupt is strikingly similar. See also the

Petitioner's Appendix D, Page 20a, of the Petition.

As pointed out in The Trenton, supra, were not the Mexican proceedings recognized, not only would the Courts have problems having to inquire into the factual situation of each foreign proceeding, or whether the foreign procedure is exactly as ours, no shipowner would be safe in purchasing a vessel if he did not have some assurance that the vessel could trade anywhere in the world without random seizure.

In view of the lower courts' holding that for practical purposes the Mexican procedure was in the nature of an in rem action and therefore should be given recognition by our courts, the Petitioner's reliance on Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1878) is inappropriate.

Petitioner further relies heavily on the case of The Goulandris (1927) L.J.R. 85, 17 Aspinall N.S. 209.

But The Goulandris, supra, is clearly distinguishable. The holding of the Court in that case was that though the English remedy was different from that available in Egypt, there was no reason why the jurisdiction to deal with Plaintiffs' claim should not have been exercised by the Egyptian Bankruptcy Court. The Plaintiffs in The Goulandris tried their best to get before the Egyptian Bankruptcy Court as part of that proceeding. Plaintiffs were informed in that case by the Syndic (trustee) in bankruptcy that even if they had a claim, it would not be allowed in the Egyptian Bankruptcy Court. Factually, it is practically the reverse of what we have here, where the

Petitioner made absolutely no effort to appear before the Mexican Bankruptcy Court, which it undisputedly could have done. Since if it had, its recovery would have been little or practically nothing, it is obvious that the Petitioner tried to avoid the Mexican Bankruptcy Court. For the Plaintiff to argue that it had no notice of the proceeding in Mexico is to fly in the face of the facts.

Morehead City, North Carolina was the first port of call of the vessel when it left Tampico, and the Petitioner had there waiting a Complaint and Warrant of Arrest for the vessel on its arrival, Respondent's Appendices C and D. The vessel was not arrested in the name of the RIO YAQUI, under the name which it sailed when the services were

provided by Gulf & Southern, but under its new name, S.S. PRESIDENT ROXAS, the name given to the vessel by Philippine President Lines, the purchaser at the Mexican bankruptcy sale. Someone knew something.

In The Nikita, 62 F. 936, 939, (5th Cir. 1894), the Court said even that many years ago the following:

"The speed of mail or telegraphic communication in these days of steam and electricity has changed materially the principal of laches in admiralty; and what in the past would have been accomplished with so much difficulty, in enforcing a lien, that no court would have demanded it, is now so little of an inconvenience as to be deemed but reasonable. These with which maritime information can be obtained, and the movements of vessels of all classes traced, leaves no excuse for lack of diligence or loss of time in permitting them to continue their voyages under a secret lien . . . "

There can be little doubt that communications are even more efficient today

than they were almost 85 years ago. Proof of Petitioner's knowledge is the fact that the vessel was arrested as the PRESIDENT ROXAS in Morehead City, North Carolina.

Since it is elementary that the process of the courts of one sovereign state cannot cross international boundary lines and be enforced in another, Ings v. Fergerson, 281 F.2d 149 at 151 (2nd Cir. 1960), Petitioner could just as well claim that a foreign notice to them was not notice even though formally given. The notice of the Mexican Court was fully equal to that given by the U.S.'s courts in an in rem proceeding. This Court should not take an action that would circumvent or violate the laws of a friendly neighbor, as stated in Ings v. Fergerson at 152.

"Upon fundamental principals of international comity, our courts dedicated to enforcement of our laws should not take such action as may cause a violation of the laws of friendly neighbor or, at least, an unnecessary circumvention of its procedures."

That bankruptcy courts decide maritime liens, and how they decide them, has simply been accepted by many courts. The Second Circuit upheld the bankruptcy court's decision on maritime liens for supplies and the court's sale of the ship. In re Marine Transit, 94 F.2d 7 (2d Cir. 1938). District Courts have also found that maritime liens are valid in bankruptcy courts and that bankruptcy courts can decide whether maritime liens exist. In re Queen Limited, 361 F. Supp. 1009 (ED PA 1972); in re Admiralty Lines, 280 F. Supp. 601 (DD LA 1968); Deana Compania Maritime S.A. v. Subfreights of SS Admiralty

Kyer, 280 F. Supp. 607 (SD NY 1968).

Two recent courts have spoken at some length on the appropriateness of jurisdiction. The Seventh Circuit in Meredosia Harbor & Fleeting Service, Inc. v. Magill, 545 F.2d 583 (7th Cir. 1976), cert. denied sub nom, Farmers & Traders State Bank of Meredosia vs. Magill, 430 U.S. 967, 97 S.Ct. 1649, held that a bankruptcy court has the power to restrain an admiralty action in rem against a ship in its control. Id. at 587. These cases are much more recent and should be given much more consideration than the old cases such as Goddard v. Weaver, 10 Fed. Cas. 513, cited by Petitioner. At best, the old cases say that when there is an execution levied on property before a petition for bankruptcy is filed, the execution would not be null and void.

What the Mexican Court has done is an act equal to our marshals' sales, and this Court does not need to wait around for some impossible-to-anticipate case involving Mexican recognition of an in rem judicial sale in this country. Sales of ships free of encumbrances would go right out the window all over the world.

Further, Mexican bankruptcy law gives secured creditors priority over lien claimants with the former class being entitled to its full share before the latter may receive anything, (Pet. App E p. 28a, 29a, 30a).

In the instant case, the proceeds of sale were first applied to the satisfaction of the S.S. RIO YAQUI mortgage, then to crewmen's wages, and so forth, (Pet. App D p. 22a). It thus appears, that, if Petitioner asserted

its claim in the Mexican proceeding, under Mexican law, it would have recovered little, if anything--a good reason for trying to avoid the results of the Mexican bankruptcy proceeding on the part of the Petitioner. Accordingly, it would be totally inequitable to allow Petitioner's claim in the instant case merely because the sale of the vessel was made in bankruptcy, not admiralty, when the Petitioner could have appeared in the bankruptcy proceeding and made its claim.

CONCLUSION

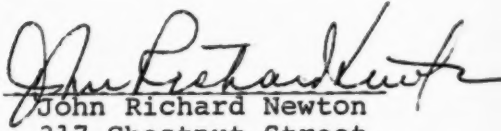
The Mexican Bankruptcy Court was a Court of competent jurisdiction. It took custody of the vessel as an asset of the bankrupt. It applied the law of the forum which was similar to and in the nature of our in rem proceedings in admiralty with the same practical

consequences. Petitioner had at least all the notice it would have had of an in rem in the United States (including Alaska and Hawaii). For the foregoing reasons, the Petition should be denied.

This the 27th day of May, 1983.

Respectfully submitted,
NEWTON, HARRIS & SHANKLIN

BY:


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APPENDIX A

Rule 17. Considerations Governing
Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX B

SUPPLEMENTAL RULES FOR CERTAIN
ADMIRALTY AND MARITIME CLAIMSRule E. Actions In Rem and Quasi In
Rem: General Provisions.

(9) Disposition of Property; Sales.

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be

ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

APPENDIX C

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
NEW BERN DIVISION

CIVIL NO. 80-152-CIV-4-A

(Filed September 18, 1980)

Gulf & Southern Terminal Corporation,
Plaintiff

vs.

S.S. PRESIDENT ROXAS, her engines,
tackle, apparel, etc., in rem,
Defendant

C O M P L A I N T

TO THE HONORABLE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA:

NOW COMES Gulf & Southern Terminal
Corporation, hereinafter referred to as
"Plaintiff", and files this, its Com-
plaint, complaining of the S.S.
PRESIDENT ROXAS, her engines, tackle,
apparel, etc., in rem, hereinafter

referred to as "Defendant", and for cause of action does respectfully show unto this Honorable Court the following:

1. At all times hereinafter mentioned and material hereto, Plaintiff was and is a business entity, duly organized and existing under the laws of a State of the United States, namely the State of Delaware, but with operations and offices in other States, including the Ports of Houston and Freeport, Texas.

2. At all times hereinafter mentioned and material hereto, S.S. PRESIDENT ROXAS was and is a steel, deep sea, cargo vessel and, upon information and belief, at all times pertinent herein said vessel was owned and operated by and on behalf of Navimex S.A. de C.V. Said vessel is or will be during

the pendency of this action within the jurisdiction of this Honorable Court and subject to seizure.

3. The S.S. PRESIDENT ROXAS was formerly named the S.S. RIO YAQUI and, at the time pertinent hereto, was owned and operated by Navimex S.A. de C.V., a Mexican company. Said previous owner caused said vessel to be conveyed to its present owner, a Phillipine company.

4. At the special instance and request of the said S.S. PRESIDENT ROXAS, then named the S.S. RIO YAQUI, and Navimex S.A. de C.V., its agents or representatives and/or the person or persons to whom the management, custody and control of the said vessel at the said places was at the time entrusted, or their agents or representatives by them duly authorized, plaintiff, on

January 14th through January 18th, 1980, at the Port of Houston, and on January 20th through January 23rd, 1980, at the Port of Freeport, Texas, performed stevedoring services and furnished materials to said vessel, amounting to Eighty-Six Thousand Eight Hundred Ninety-Five and 21/100 (\$86,895.21) Dollars at Houston and Twenty-Eight Thousand Six Hundred Eighteen and 63/100 (\$28,618.63) Dollars at Freeport, or a total sum of One Hundred Fifteen Thousand Five Hundred Thirteen and 84/100 (\$115,513.84) Dollars, which was in fact the agreed and reasonable value of such services and necessities.

5. By reason of the premises, there became due and owing the plaintiff from the said vessel the sum of One Hundred Fifteen Thousand Five Hundred

Thirteen and 84/100 (\$115,513.84) Dollars, no part of which has been paid, so that there is now due and owing the plaintiff the sum of One Hundred Fifteen Thousand Five Hundred Thirteen and 84/100 (\$115,513.84) Dollars, with interest thereon from the dates aforementioned that the respective services and necessities making up said amount were furnished. Plaintiff duly demanded payment of the One Hundred Fifteen Thousand Five Hundred Thirteen and 84/100 (\$115,513.84) Dollars, no part of which has been paid.

6. By reason of the premises and the nature of the services and necessities performed, supplied and rendered, Plaintiff has a maritime lien upon the said vessel for the aforesaid amount, with interest as aforesaid, under and by

virtue of the provisions of the Act of Congress entitled Merchant Marine Act, 1920, approved June 5, 1920, and acts amendatory thereof and supplemental thereto.

7. All and singular the premises are true within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, Plaintiff prays that:

1. Process in due form of law according to the practices of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the S.S. PRESIDENT ROXAS, her engines, tackle, apparel, etc., and that all persons claiming any right, title or interest in said vessel may be cited to appear and answer all and singular the matters aforesaid.

2. Plaintiff may have a decree against said vessel for the amounts owned, with interest and costs.

3. Said vessel be sold under the direction of this Honorable Court and the proceeds of the sale be brought into this Court to satisfy this decree.

4. This Honorable Court will grant to the Plaintiff such other and further relief as the justice of the cause may require.

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Attorneys for the
Plaintiff

By /s/ C. R. WHEATLY, JR.
C. R. Wheatly, Jr.

NORTH CAROLINA
CARTERET COUNTY

C. R. Wheatly, Jr., being duly sworn, does depose and say:

That he is of counsel in this cause and that all matters and things hereinabove alleged are predicated upon information which he believes to be true. Said information was furnished him by the plaintiff through authorized agents and attorneys.

That none of the officers of the plaintiff corporation are now within this District and that the necessity of time will not allow the verification by a corporate officer in apt time.

/s/ C. R. WHEATLY, JR.
C. R. Wheatly, Jr.

Sworn to and subscribed before me
this 18th day of September, 1980.

/s/ EVELYN A. RICE
Notary Public

My Commission Expires: Nov. 2/84

APPENDIX D

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
NEW BERN DIVISION

CIVIL NO. 80-152-CIV-4A

(Filed September 18, 1980)

Gulf & Southern Terminal Corporation,
Plaintiff

vs.

S.S. PRESIDENT ROXAS, her engines,
tackle, apparel, etc., in rem,
Defendant

WARRANT OF ARREST

The President of the United States of
America to the Marshal of the Eastern
District of North Carolina, GREETINGS:

Whereas a complaint seeking the
arrest of the Vessel S. S. PRESIDENT
ROXAS has been filed in the District
Court of the United States for the
Eastern District of North Carolina, on
the 18th day of September, 1980, by Gulf
& Southern Terminal Corporation, Plain-

tiff, against said Vessel S.S. PRESIDENT ROXAS, in rem, for the reasons and causes in the said Complaint mentioned, and praying the usual process and order of the said Court in that behalf to be made, and that all persons interested in the said Vessel S.S. PRESIDENT ROXAS, her engines, tackle, apparel, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Vessel S. S. PRESIDENT ROXAS, her engines, tackle, apparel, etc., may for the causes in the said Complaint mentioned be condemned and sold to pay the demands of the Plaintiff;

YOU ARE, THEREFORE, HEREBY COMMANDED to attach the said S.S. PRESIDENT ROXAS, her engines, tackle, etc., and to detain the same in your custody until the further order of the Court res-

pecting same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Complaint, and make your return to this Court thereafter.

WITNESS, The Hon. J. Rich Leonard,
Clerk of said Court, this 18th day of
September, 1980.

/s/ GERALD L. ATKINS
Deputy Clerk

Wheatly, Wheatly, Davis & Nobles, P.A.
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Beaufort, N. C. 28516
(919) 728-3158
Of Counsel for the Plaintiff

MARSHAL'S RETURN

In obedience to the within Warrant of Arrest, I attached the Vessel S.S. PRESIDENT ROXAS described herein on the 9/20/80 day of September, 1980.

U. S. Marshal